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ABSTRACT

Education law changes rapidly, making it difficult to understand and administer. Even when it is understood, school boards and administrators often must make legal decisions contrary to their own value systems. One way to lessen these conflicts is preventive law, the voluntary revision of school district policies and procedures to lessen or eliminate potential litigation. Chapter 1 of this report covers perspectives on preventive education law. It stresses that the greater the use of preventive law strategies, the less the need for conflict resolution through litigation. Chapter 2 reviews the history of education law and litigation in the United States and presents the political-administrative model for conflict resolution. Conflict settlement through the judicial process is presented as well as efforts to create a new administrative model for dealing with legal conflict. The emerging concept of preventive law and its promise for avoiding legal conflict is the topic of chapter 3. The origins of preventive education law are covered and a new model for preventive law is offered. Chapter 4 includes preventive law strategies: increased communication among educators and parents, better understanding of education law, stronger implementation of policies and procedures, internal review of school district policy, and an external preventive law audit. (Contains 54 references.) (JPT)

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PREVENTIVE LAW: STRATEGIES FOR AVOIDANCE OF LITIGATION IN PUBLIC SCHOOLS

ED 366 092

Harold L. Hawkins

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PREVENTIVE LAW: STRATEGIES FOR AVOIDANCE OF LITIGATION IN PUBLIC SCHOOL

Harold L. Hawkins
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UCEA MONOGRAPH SERIES

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FOREWORD

Preventive Law is the first in a new series of UCEA monographs addressing questions of importance to the profession of educational administration. Professor Hawkins has very impressively developed an approach to preventive law that should prove highly useful to students of school law, as well as practicing school administrators.

In addition to expressing gratitude to Professor Hawkins for this significant contribution, UCEA's appreciation is also due the editors of the monograph series, Frederick C. Wendel (University of Nebraska-Lincoln) and Edgar Kelley (Western Michigan University) who have devoted a great deal of time to the preparation of these monographs for publication. A special thanks is also due Donald F. Uerling (University of Nebraska-Lincoln) for the expertise and time he devoted to reviewing and editing this manuscript.

The work of the University Council is accomplished only through the spirited generosity of professors and administrators who are anxious to make a contribution to their profession. We are happy that UCEA can provide the vehicle for these contributions. We look forward to a collection of monographs of the highest quality and interest.

Patrick B. Forsyth
UCEA Executive Director
University Park, Pennsylvania

PREFACE

The author wishes to acknowledge the assistance provided by his professional colleagues and others in the development and writing of this monograph.

Reactions to the preventive law concept were provided by the faculty in the Department of Educational Administration at Texas A&M University. Discussion of material in greater depth came from Stan Carpenter, David Erlandson, and Phil West. The encouragement, criticism, and contributions of these associates were greatly appreciated. Harvey Tucker, political scientist at Texas A&M, was an additional reactor to content related to politics and education.

To readers of the manuscript, Paul Warr, Stan Carpenter, and Phil West, the author is deeply indebted. For his early support of the author's interest in preventive law and his continued expertise in legal matters, a very real debt of gratitude is owed to Perry Zirkel at Lehigh University.

Appreciation is also expressed to the University Council for Educational Administration for its willingness to engage in raising the level of awareness concerning an emerging concept in education law.

Lastly, but mot noteworthy, is the gratitude due David Hebert and Evangeline McJamerson for their numerous contributions as graduate assistants. To Joan Lott and Martha Copp whose patience and skill on the word processor brought the manuscript to its final stage, my deep appreciation is acknowledged.

Harold Hawkins
College Station, Texas

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CHAPTER 1

PREVENTIVE LAW IN PERSPECTIVE

Law is dynamic and ever changing; educational law possesses these same characteristics. The elements of change make educational law difficult to understand and complex to administer. Even when the law is appropriately understood, educators at times make decisions contrary to their own personal value systems. Within these circumstances lie the roots of conflict and disagreement about the operation of school systems. These disagreements may result from individuals who knowingly or unknowingly fail to follow the rules. The rules themselves may be faulty; or, as too frequently occurs, rule enforcement is the problem. School officials, like other officers use litigation as one method of conflict resolution. Reliance on court decisions may be a reasoned choice of school officials or a choice forced by those claiming injury from wrongful acts. Education has experienced a significant increase in litigation and a need exists for alternative processes for handling conflicts. One alternative is preventive law. In education, preventive law is the voluntary revision of school district policies and procedures to lessen or obviate potential litigation.

Educational Governance and Conflict

The involvement of school boards and administrators in conflict is nothing new. The attitude toward conflict is different from what it was prior to 1950. Since then, the protection of individual rights is not only expected but also demanded throughout society. Education, the most visible of local governmental functions, is often the center of this societal climate. Conflict resolution in education is the task of settling disagreements about the effect of school district decisions on individuals or groups; resolutions can range from a simple discussion and clarification of facts to lengthy litigation.

Governing boards and administrators must deal with conflict and bring about acceptable solutions. Conflict resolution in schools is a requisite aspect of governance. Whether it involves teacher dismissal, student

expulsion, or religion in the schools, the level of emotion runs high. Relationships connected with conflict are usually unpleasant to the extent that often one is inclined to avoid conflict. Even though some disagreements can produce constructive change without continuing controversy, is there not a way to lessen the instances of dispute and create a more positive organizational climate? Those who search for better methods even before the need is absolute believe that some conflict can be avoided.

The traditional view is that the more individuals understand about their rights, the more they will demand the fulfillment of those rights. Consequently, some school systems tend to operate with a minimum of communication and understanding about operational practices. Corwin[1], who researched conflict in organizations such as public schools, spoke of the relationship between participation and conflict. He theorized that as teacher participation in administrative decisions increased so did the number of *minor* disputes. At the same time the number of *major* disputes declined. Therefore, one can postulate that broader involvement of those affected by legal parameters might assist in the determination of effective parameters. Policy review by an increased number of individuals should enhance the validity of those policies.

Major disputes occurring in school districts often result in litigation which is costly in terms of financial resources, personal and professional time, and emotional energy. These factors create a natural desire to avoid disputes, particularly those that lead to litigation, and avoidance of litigation is viewed as a desirable end. One needs to be fully cognizant of a significant qualifier placed on the term "avoidance of litigation" as used in this discussion: Some litigation should not be avoided. In issues establishing and clarifying individual rights, adjudication to a point may be needed. Broad application of judicial decisions, as in landmark cases, is obviously the result. This qualifier does not extend to the considerable volume of educational litigation, especially at the appellate court level, which could be avoided through less emphasis on "winning" at all costs. Avoidance is used here, then, to mean facilitating conflict resolution in public schools by minimizing the need for litigation, and increasing the possibility of judicial support when litigation does occur.

Relevance of Preventive Law

The nature of the legal conflicts addressed are as encompassing as education itself. In many instances, the term public schools can be translated as institutions of higher education and, even to a lesser extent, private educational systems. Private education is unaffected or affected differently by much of educational law, however, given some adaptations,

the need for a proactive stance on legal problems also exists in the private sector of education.

Only in use for thirty-five years as a legal term, the application of preventive law to education is still in its infancy. Whether prevention will become a well-understood practice accepted by educators and attorneys can not yet be ascertained.

Preventive law, at this time, makes one primary assumption: *The greater the use of preventive law strategies, the less the need for conflict resolution through litigation.* The concept of preventive law, in a very practical sense, should help to keep school districts out of court and to improve the chances of a pro-district decision when disputes move to litigation.

An Overview

The discussion about preventive law in this volume is organized in four chapters. This chapter has introduced the topic. Chapter Two contains a discussion of the nature of legal conflict in schools. A review of litigation is presented along with two presentations that depict active and reactive modes for dispute settlement. In Chapter Three preventive law is described as an emerging concept and is presented as a proactive mode for resolution of conflict. Preventive law strategies are provided in the final chapter. Preceding each strategy is an inventory of potential causes of conflict to which the strategy can be applied.

A Precautionary Word

The advocacy of new perspectives can easily create false impressions. This discussion does not escape such a possibility. At times school boards and administrators may be pictured as incompetent resolvers of disagreements. At other times one may interpret the discussion as implying the inappropriate involvement of the courts in the business of education. Neither impression is accurate. The intention rather is to portray the need for effective practice in both levels of governmental responsibility. There are times when trends need study and redirection. Preventive law is not a panacea for the ills of education but another way of examining how public schools and courts of law interact.

Chapter Note

1. See these publications of Ronald G. Corwin on the topic of conflict: Ronald G. Corwin, *Staff Conflicts in The Public Schools*, Ohio State University, Columbus, Ohio, 1966 and Ronald G. Corwin, Patterns of Organizational Conflict, *Administrative Science Quarterly*, 14, 4, (December 1969).

CHAPTER 2

LEGAL CONFLICT IN SCHOOLS

American society entered the second half of the twentieth century with a determination to attack barriers to individual rights and freedoms. That determination spawned what history may yet record as the Era of Litigation. Launched by *Brown*,[1] fostered by *Tinker*,[2] illuminated by *Rodriguez*,[3] and advanced by *Goss*,[4] education-related litigation flowed as never before during the first 150 years of this nation's history.

Education law literature reports that the U.S. Supreme Court provided few opinions affecting education prior to 1950, but a resoundingly large number of decisions were rendered during the ensuing thirty years. The growth of litigation in the federal districts and circuits created a monumental work load for the high court. One question raised is: At what point does the legal process cease being the resolver of problems and become the problem itself?

While the volume of litigation during recent years was not limited to desegregation matters, that issue certainly led the way in producing judicial action. Wirt and Kirst[5], in discussing educational policymaking, analyzed the judiciary as a motivator of change. In the context of southern school desegregation outcomes, they identified these variations in legal compliance: voluntary noncompliance; involuntary minimal compliance; involuntary token compliance; involuntary moderate compliance; voluntary minimal compliance; and voluntary compliance. The range of response voluntary noncompliance to voluntary compliance results from many complex factors. The responses came from prejudicial attitudes derived from years of discriminatory practices, from logistical concerns related to available physical space, and from beliefs that educational opportunity should be available to all children. One school district lost its segregated high school for blacks through fire; desegregation became the most practical of all alternatives. Another school district preferred to resolve its own problems without interference from the outside. A general attitude in many districts was to take a wait and see posture. Regardless of the numbers of school systems in each of the response groupings, court mandates caused reactive behavior in school districts across the nation.

Excessive litigation and the accompanying impact of judicial intervention greatly influenced education and its governance during the period 1950 to 1985. Most individuals accept this phenomenon but awareness is growing that a redirection away from reliance on litigation is urgently needed.

This section on legal conflict in schools provides a historical overview, suggests that education is engaged in an era of litigation, examines the political and judicial models for conflict resolution, and presents a rationale for a new model.

Historical Overview of Schools and the Courts

Neither the study of educational reports nor the review of legal documents affords solid data on the extent to which educational systems have been involved historically with the courts. Public education as a state function was both benefited and hampered over the years by its relationship with state and federal judicial systems. The federal relationship was especially limited since few cases arising in education reached the federal level during the early years of this nation. Garber[6] reported that not more than three instances of litigation on public education issues which resulted in decisions reached the federal courts during 1951; yet, in 1971, the number of education cases in the federal courts had increased to nearly 150. In 1978 a Phi Delta Kappa study compiled the significant Supreme Court decisions affecting education.[7] Of 162 cases reported, 27 occurred prior to 1950 and 135 during the remaining years, 1950-1977; while these data do not confirm the number of cases filed, they at least indicate that an avalanche of litigation occurred in that time period.

The work of Zirkel for Phi Delta Kappa was updated and amplified by Reutter who provided an analysis of the Supreme Court's rulings that had a major impact on education. His comprehensive report covers a broad range of legal issues in education. In terms of the amount of litigation over the years, Reutter emphasized that "Supreme Court [holdings] do not provide a complete picture. . . because opinions are rendered only on questions properly presented in cases actually brought before the Court."[8] The decisions by the Supreme Court represent only the top of the pyramid of litigation. The volume of litigation is at lower jurisdictions. Opinion differ regarding whether educational lawsuits are disproportionate to those in other segments of society. Two facts though are indisputable: (1) litigation in education has increased significantly and (2) educational litigation has broad impact.

What brought about this significant increase in the use of the courts to settle legal disputes in education? A changing society with new values and

different perspectives about governmental services was one important factor. According to one authority the increased litigation came about for two reasons:

> First, federal courts have abandoned their hands-off policy toward some matters traditionally left to the discretion of school boards; and second, school cases have become increasingly concerned with questions of constitutional rights.[9]

Regardless of how one views the increase in litigation, *Brown*[10] was a turning point. In fact some authorities credit the first desegregation decision as more than the initiation of a new direction. Among those are Carter and Lawson[11] who claim that this decision had significant effect on federal statutory enactments during the 1960's, e.g. Title VII of the 1964 Civil Rights Act,[12] the 1965 Voting Rights Act,[13] the 1968 Civil Rights Act,[14] the Bilingual Education statute,[15] Title IX,[16] and the Education of the Handicapped Act.[17] Significant effect as used here must be construed as constituting a climate of the times since *Brown* was not always a reference in the congressional debates preceding these enactments. This trend toward intervention may not have peaked but may still be moving toward higher levels of activity.

The Era of Litigation

Education seems to be experiencing what might be regarded as the era of litigation. Many legal issues have been clarified or resolved by judicial decisions, but what has been the real impact on education? Have the schools been well-served by the emphasis on legal intervention? Are the courts in the saddle and the school boards out? One analyst, Hazard,[18] has concluded that the role of school boards in policy making has changed. When the school board's decision is not accepted as the final word, parents and local groups regard the action of the board as a launching pad for litigation. Such conflict often necessitates revision of educational policies because of new legal interpretations. Hazard formulated several propositions about outside influences on board policymaking.

1. [Little is known] about the way board decisions are influenced by court decisions.

2. Court decisions on policy issues may be more dramatic than other determinants, but whether they're more effective is not clear.

3. The impact of court-made policy on the schooling process is largely unknown.

4. Court decisions are more powerful determinants of educational policy than any notion of local control or school board autonomy.[19]

Legal challenges to educational policy have in many instances been necessary and well-warranted. But to what extent are the courts infringing on the educational process? The relationship of the courts and the schools is such that regardless of whether the demise of the authority of school boards occurs, local control over school district policy has suffered greatly.

Another view which presents a less dramatic picture of judicial influences is that of Lufler[20] who describes the impact of United States Supreme Court decisions as occurring at three levels. An obvious impact is that upon the litigants themselves. The second impact level may be a specific effect on various persons within the school districts. A significant third level, one often overlooked, is impact which was neither intended nor foreseen. The use of litigation to resolve conflict is likely to have these several impacts, even if a dispute is limited in intensity and duration.

The role of the school district attorney has changed with increased litigation. In the past, few individuals trained in law were willing to provide legal counsel to school districts. Compensation for services was meager compared with other areas of legal practice, especially criminal and corporate law. Uncertainty prevailed in some states during the 1920s regarding the authority of school boards to employ an attorney. For example, this lack of clarity necessitated an attorney general's ruling in Minnesota in 1929 to assure that boards possessed such an implied power. A Texas case involving the same issue produced this statement by the court:

> Public officials are presumed to do their duty, and whereas here a board of laymen sought a legal opinion from a reputable lawyer as to their duties under the circumstances, and then followed that legal opinion, they have not acted willfully or corruptly.[21]

Efforts to analyze the role of legal counsel support a conviction that: (1) school attorneys are most often used to assist with procedural issues; (2) personnel problems require the next largest proportion of participation; and (3) communications about school district business constitute another major area of needed counsel.[22]

The Political/Administrative Model for Conflict Resolution

The use of litigation is an important method for conflict resolution. The term conflict resolution used in this discussion may differ from how it applies in other disciplines. School boards and administrators devote a

notable amount of time to the settlement of disagreements. These include petty grievances as well as major disputes over class action related to discrimination. These actions are viewed here as conflict and the steps necessary to settle differences as conflict resolution. Litigation represents one of the many mechanisms for conflict resolution.

Examination of litigation requires an awareness of a range of alternatives for conflict resolution. The political model is one alternative to litigation; the school is recognized as a political system and it utilizes , knowingly or otherwise, concepts and theories from political science. But under what circumstances does a political model for conflict resolution serve the district? When is it advisable to let the courts settle a problem regardless of cost?

Sergiovanni and Carver examined several theoretical approaches to how organizations (including schools) function in times of conflict. The political model "views outcomes as resulting from intraorganizational phenomena such as compromise, coalition, competition, and confusion."[23] These researchers provided several assumptions about the nature of political systems:

1. Conflict is natural, and is to be expected in a dynamic organization. Conflict is not abnormal, nor is it necessarily a symptom of a breakdown in the organization's community.

2. The organization is fragmented into many power blocs and interest groups, and it is natural that they will try to influence policy so that their values and goals are given primary consideration.

3. In all organizations small groups of political elites govern most of the major decisions. However, this does not mean that one elite group governs everything; the decisions may be divided up, with different elite groups controlling different decisions.

4. Formal authority, as prescribed by the bureaucratic system, is severely limited by the political pressure and bargaining tactics that groups can exert against authorities. Decisions are not simply bureaucratic orders, but are instead negotiated compromises among competing groups. Officials are not free simply to order decisions; instead they have to jockey between interest groups, hoping to build viable compromises among powerful blocs.

5. External interest groups have a great deal of influence over the organization, and internal groups do not have the power to make policies in a vacuum.[24]

The nature of political system such as schools demands that the decisions made by boards and administrators usually relate to people—students, employees, or the constituency in the community. Analysts in the science of politics use political models to describe the phenomena that take place in a societal setting. In education the political process is governed at the operational level by administrative law, the policies and regulations that determine not only how things will be done but whether a decision is consistent with the existing organizational policy. The importance of administrative law was noted by Payton[25] who stressed that administration takes place in the conflicting areas of politics and government. She advocated that administrative law is mainly about agencies, not mainly about courts. For education, an administrative model for conflict resolution is more appropriate than a political model.

The traditional view of conflict resolution in a school district is provided in Figure 1. The graphic presentation is labeled as a "model" in the manner that the term is often used in an educational context. Technically, the figure depicts a process. The caption reflects the relevance of both political and administrative processes although the process discussed is that which occurs in educational settings. Note that the emphasis is largely on agency involvement. Two observations about this model seem worth stating. It is referred to as the traditional model because prior to 1950 most conflict resolution in public education resulted from decisions by governing boards and administrators. Relatively little litigation involving education took place. The process of dealing with conflict was a normal, continuous occurrence. The model therefore is regarded as an *active mode* of conflict resolution as its use was generally acceptable practice prior to the advent of more strident demands by the constituency.

Activity surrounding the settlement of disputes is viewed here as largely dependent upon forces internal to school districts. The internal sources are viewed as the composite of all forces within the local school district. Problems are generated primarily by demands and interactions of the community, the board, the administrators, the faculty, and the staff. Bases for settlement usually evolve from local policies and regulations, custom and practice, and due process and appeals. Forces external to the school district that influence the resolution of conflict may be introduced by such related interests as legislation, state agency rules and regulations, attorney-general opinions, and judicial decisions. Less formal influences may be exercised by professional organizations in education, model policies, and any other relevant information that may reach the school board and administrators from outside sources. Using a mix of the interventions identified above, decisions are made in a major portion of specific conflicts

as indicated by the action line and arrow directed to conflict resolution. The process depicted as the active mode for conflict resolution worked reasonably well during the years when authority was more generally accepted and individual rights were not as strenuously pursued.

Figure 1
Political/Administrative Model
Active Model for Conflict Resolution

In summary, two additional points inherent in the political/administrative model for conflict resolution become apparent: (1) the formal decision at the local level is the responsibility of the school board or its administrators, and (2) there are no guarantees that a decision will be acceptable to the parties involved. The political/administrative process, even when acceptable to those directly involved, is often complex in its nature. The difficulty with this model lies in "achieving the proper mix of legality, political legitimacy, accountability and effectiveness....."[26] The failure to obtain the proper mix may be the reason that the process often produced less than satisfactory results. As contrasted with views presented later, this model

depicts the process of conflict resolution as an active mode, i.e., the process is self-generating and continuous in response to normal demand.

Conflict Settlement Through the Judicial Process

Hudgins and Vacca suggested that legal approaches to conflict resolution differ from those purely political:

> At the very core of the American legal system is the principle that for every *wrong* (violation of a right) done to an individual by government or by another individual, there should be a *remedy* (some form of compensation or relief) provided. A citizen must be protected from injustice and must also have some place to go (when all else fails), to seek justice. In our social structure the courts of this nation exist for such purposes.[27]

Clearly, the adjudication process for conflict resolution has a structure of its own designed to meet needs not cared for by other social and political mechanisms.

Many school districts experience legal problems involving alleged violation of various individual or collective rights. The potential and actual violations relate to a variety of actions governed by constitutional and statutory provisions. One area of dispute has been equal pay for equal work, especially involving differences related to the gender of the employee. The case cited below is illustrative of the litigation many school districts have experienced. The Fifth Circuit Court of Appeals described the problem in this manner:

> For some years, extending back at least to the late 1960's, the school district paid male teachers $300 a year more than female teachers. On June 23, 1972, Congress... [removed] the "executive, administrative, or professional" employee exemption from the Act. The defendant did not comply with this prohibition against sex discrimination until June 1973. The Secretary of Labor filed suit against the district on November 14,1974, asking for an injunction against future violations of the Act and for an injunction against the withholding of back pay owed to female employees after removal of the professional employee exemption. Later the Equal Opportunity Commission (EEOC) was substituted as plaintiff.[28]

The court opinion then cited the circumstances under which the alleged violation occurred and reiterated the justification for the school district actions.

> At the trial, supervisory personnel of the school district termed the extra $300 a "head of household" allowance and testified that it was paid for "extra duties." Evidence established, however, that the school district's Board of Supervisors

made no inquiry into whether any female teachers were heads of household and that several in fact were the principal breadwinners for their families. The district court found "any distinction between the male and female teachers as to duties, skill, effort, or responsibility to be illusory." Although a former principal stated that the extra money was justified by male teachers' availability for crowd control, ticket selling, and other duties, the district court found that all teachers handled supervision, discipline, and crowd control. Male teachers stood at the gates during football games and female teachers were required to sit in the bleachers. Males patrolled the school grounds during the lunch hour while females supervised the hallways. Female teachers rode student buses to out-of town school functions. The trial judge concluded that "[al]though one teacher may have performed a task that was different from that assigned to another teacher, these duties were not substantially different and involved equal skill,effort, and responsibility."[29]

Figure 2
Litigation Model
Reactive Model for Conflict Resolution

The court determined that the school district had willfully violated the Act. The defendant school system appealed to the Fifth Circuit Court where the judgment was reaffirmed. Back wages of $35,674 plus six years' interest were ordered as payment to female teachers.

Courts normally do not intervene in conflict resolution without one or both parties requesting such involvement. Such was true in this case. The administrative process of conflict resolution was not effective in avoiding a discriminatory practice.

The litigation model for conflict resolution can be understood in contrast to the political-administrative model by reviewing Figure 2. In this model, needed to resolve problems following lack of successful conflict resolution through administrative channels, the board and its administrators and legal counsel become dependent upon the judicial system.

Litigation may occur either through the board's choice to use litigation or as the result of its being named a defendant in a law suit. Courts draw upon the appropriate constitution(s), statutes, legal precedence (*stare decisis*), local policy, and custom and practice for the legal basis upon which to hear the evidence and to make a decision. In this process the resolution of conflict results from the formal action (rendering a decision) by the court. Although the resolution of conflict may not be acceptable to either of the parties involved, the judgment of the court constitutes final resolution when the appeal limits are reached.

Although simple on paper, litigation is much more time-consuming than the administrative model. The advice of legal counsel, the preparation and presentation of briefs and evidence, and the delays in the scheduling of cases all extend the time of settlements to months and often years.

The litigation model operates in a reactive mode. Reactive here means a formal demand extending beyond that identified in the political/administrative model where opportunities for settlement still prevailed within the local setting. The demand for resolution stems from a specific conflict in which early attempts to bring closure to the problem have not been successful. Therefore, school officials react to a problem by initiating a law suit or by being forced into litigation by a troubled individual or group.

Does the utilization of the litigation model by school boards suggest an abdication of responsibility for conflict resolution? Some evidence suggests that boards have found the local political machinery inadequate to meet the demand (See information reported later in this chapter concerning appeals brought by school districts). This was often so in the context of problems related to desegregation. Many boards found it appropriate to permit or require outside intervention in dealing with complex issues such as those called for under desegregation requirements. At the same time

direct access to federal district courts by aggrieved parties served to bypass administrative channels even when less formalized procedures might have resulted in an amicable resolution of conflict.

The lack of responsiveness by boards to legal mandates, whether by choice or inability, has led to claims that local school boards are no longer effective because they have given up, or been deprived of, local control. Most education authorities accept a federal role in education while continuing to adhere to the belief that most of what is "good" in a school district results from local determination rather than from either state or federal intervention. Because boards and administrators can easily find ways to avoid decisions in the midst of conflict, one is led to the impression that no action is possible. Most control in conflict resolutions, however, still resides within the school boards. Among those having researched the decision-making capacity of local districts is Lutz[30] who provided the following propositions regarding board policymaking: (note the contrast with Hazard's work reported in an earlier part of this discussion):

1. School boards are a fundamental grass-roots unit of American democracy governed by the principles of the dissatisfaction theory.

2. The vast majority of policy decisions in public education are made, with considerable latitude, by local school boards—in spite of or in conjunction with federal and state regulations and mandates.

3. School board behavior is shaped by a set of "significant symbols" called a culture of school boards that includes norms and values shared by the majority of the 15,000 local school boards.

4. The majority of school policy decisions are made in elite fashion by school boards that can best be termed elite councils.

4a. When school board members are forced into arena behavior, they become dissatisfied with their own behavior and tend to resign or fail to run for reelection.

5. Education in our pluralistic culture requires culturally pluralistic values, and these are best served by arena council behavior.

These propositions, if accurate, suggest the effectiveness, or the lack of thereof, found in the use of the political/administrative model of conflict resolution. For example, the reference in 4a to arena behavior describes the lack of stability among school board members when forced into uncomfort-

able positions of decision-making with pressure from opposing sides. One result is the tendency for boards to resort to the litigation model as a means of dealing with the monumental problems facing education.

In Search of a New Model

Any school district copes with conflict on an almost daily basis. The administrative model serves effectively in many instances. For some areas of conflict, litigation is necessary to bring about an acceptable resolution. Controversy surrounding personnel termination, student personnel management, and deprivation of First Amendment rights may require judicial action to clarify the law and establish a precedent.

Reliance on the judicial system has become too much the accepted way of "winning" the dispute. This willingness to go to court has been so ingrained that educators smile only slightly at the presumed humor:

> Teacher: (To a small child) I certainly hope that you were not injured by the fall when your classroom chair broke.
>
> Student: I really did not get hurt much - only enough to bring a good court settlement when I sue!

Although a heavy load of litigation is found at all judicial levels, the U.S. Supreme Court on occasion has spoken to what it considered inappropriate dependence on the courts:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day to day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and if erroneous, can best be corrected in other ways.[31]

The position of the court was not that it is inappropriate for the wronged individual to seek a remedy but that the remedy in many instances is more appropriately administrative. The referenced case in fact was not one which involved an educational problem. Instead the case involved a municipal employee, a policeman, and his efforts to have the Court address his grievances. The words of the opinion apply equally to school districts.

Is the quality of litigation in education reaching a saturation point? At least some individuals are beginning to believe that the time has come to

reverse the trend that has produced such extensive use of the courts to resolve conflict.

In their study of litigation as a political strategy, Wirt and Kirst have referred to the increase in the volume and kinds of litigation and cited the extent of cases against the California State Board of Education in 1979.[32] Table 1 reports the nature of the litigated problems.

Table 1
Educational Litigation in California
1979

Discrimination	Money	Curriculum	District Reorganization	Miscellaneous
11 race	10 contact disputes	5 handicapped programs		3 non-public schools
3 bilingual	8 local finances	2 textbooks		3 citizen participation
2 testing		1 inadequate		2 personal injuries
2 employment				2 accreditation
1 sexual				1 strike
19	18	8	6	11 = 62
31%	29%	13%	10%	18% = 100%

They concluded that school policy is shaped greatly by the judiciary, but that the courts cannot do everything. How many of these legal problems could or should have been resolved prior to litigation? A study by Hawkins in 1982 examined the use of the courts to resolve conflict in Texas. He found that:

a. State departments of education maintain no records reflecting the extent or the cost of litigation in public schools. Such information would be helpful but is not reported by local school districts to the state agency.

b. [Neither do federal sources compile] cost data related to public school district legal expenses.

c. Some individuals concede that much of the legal expense is for needless litigation.

d. Educators generally believe that those in the field of educational administration will need to take the leadership in redirecting the focus toward mechanisms other than legal processes for conflict resolution.[33]

Further insight about the prevalence of litigation is reflected in a pilot research project that identified public school litigation in Texas during the period 1977-82.[34] The research was based on Texas school districts in which the judgment was against a school district as the defendant at the trial court level or the appellant at a federal court level. Excluded were cases involving desegregation, tax issues, and boundary disputes. Table 2 reports the number of citations found for Texas cases.

Table 2
Texas Appellant Cases in Education, 1977-1982

Texas Courts	80
Federal District	36*
Federal Circuit Court of Appeals	51

* Only a fraction of federal district cases are published by West in the Federal Supplement.

Without a comparative base, no definitive conclusions can be made from these figures; however, when viewed from an historical perspective that indicates a low incidence of litigation before 1950, the magnitude of increase in conflict resolution by the courts becomes clearer.

The dollar cost of litigation is only one tangible aspect of the problem. Also costly to a school district is the expenditure of time and effort related to litigation. The adversarial nature of conflict resolution through the courts also has a high cost in terms of alienation. An emotionally laden trial and subsequent appeals create division within a school district and community that may take years to repair. The psychological scars may endure for years with an impact that threatens the tenure of administrators and school board members. The focus in this context is not on the quality of the decision but rather the extended period of disruption that occurs during, and often long after, the litigation.

Some research involving the extent of court intervention provides a somewhat different perspective. Zirkel, in surveying court decisions concerning faculty employment in higher education found evidence of a

possible leveling off in some areas. He determined that during the period 1977-81 no increase in reported cases could be substantiated. His conclusion, nevertheless, was that "these reported appellate decisions are only the tip of the iceberg."[35] As part of a nationwide study, Maxwell and Galfo[36] found that the number of civil cases involving public school students more than doubled in the three-year period 1977 [N=217] to 1980 [N=527].

The era of litigation for school systems has arrived. A new model for conflict resolution is needed. The search for improved methods to lessen litigation requires the creative thinking of school boards, educators, attorneys, and others who believe that a return to a less formalized, less costly, and less adversarial mode is overdue.

Chapter Notes

[1]*Brown v. Board of Education*, 347 U.S. 483 (1954) and *Brown v. Board of Education*, 349 U.S. 294 (1955).

[2]*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

[3]*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

[4]*Goss v. Lopez*, 419 U.S. 565 (1975).

[5]Frederick M. Wirt and Michael W. Kirst, *Political and Social Foundations*, 1972, at 183, 184.

[6]L. Garber, Twenty Years of Landmark Decisions, *Nation's Schools*, December 1971 at 54.

[7]Phi Delta Kappa, *A Digest of Supreme Court Decisions Affecting Education*, (P. Zirkel ed. 1978).

[8]E. Reutter, Jr., *The Supreme Court's Impact on Education*, 1982 at 2.

[9]Garber, see note 6 at 54.

[10]Brown, Supra. See note 1.

[11]D. Carter and M. Lawson, *Employment Discrimination: Age, Sex, and National Origin* (in School Law for a New Decade, NOLPE 1981 at 226).

[12]42 U.S.C. sec. 2000e-17 (1976).

[13]Id. sec. 1973.

[14]18 U.S.C. secs. 241-44 (1976).

[15]20 U.S.C. sec. 800b-1(a)(4)(i) (Supp V)(1975), Amending 20 U.S.C. sec. 800 b-1(4)(B)(C)(D)(E)(1970).

[16]20 U.S.C. sec. 1681 et seq.

[17]20 U.S.C. sec. 1401 et seq.

[18]William R. Hazard, Phi Delta Kappa, Courts in the Saddle: School Boards Out, December, 1974. (Reprinted in W. Hazard, *Education and the Law* 2d, The Free Press, 1978).

[19]Id at 17, 18.

[20]H. Lufler, Unintended Impact Of Supreme Court School Discipline Decisions (in *Contemporary Legal Issues in Education*, NOLPE, 1979, at 7).

[21]Reyna v. State, 319 S.W. 2d 28(1958) in S. Joyce, Research Study, *NOLPE School Law Journal*, 10(2) 1982 at 193.

[22]Id at 197.

[23]T. Sergiovanni and Fred D. Carver, *The New School Executive*, 1980 at 231.

[24]V. Baldridge quoted in T. Sergiovanni and Fred D. Carver in *The New School Executive*, 1980 at 234, 235.

[25]S. Payton, Administrative Law: What Is It and What Is It Doing In Our Law School? *Law Quadrangle Notes*, 28(1) Fall, 1983 at 30.

[26]Id at 31.

[27]H. Hudgins, Jr., and R. Vacca, Law and Education: *Contemporary Issues and Court Decisions*, 1979 at 3, 4.

[28]*Marshall v. A&M Consolidated School District*, 605 F2d at 187.

[29]Id at 188.

[30]F. Lutz, Local School Board Decision-Making: A Political-Anthropological Analysis, *Education and Urban Society* 12(4) August 1980 at 464, 465.

[31]*Bishop v. Wood* 426 U.S. at 349, 350.

[32]F. Wirt and M. Kirst, *Schools in Conflict*, 1982 at 254.

[33]H. Hawkins, Back to the Legal Basics: An Ounce of Prevention, *Kansas School Board Journal*, Winter 1982 at 8.

[34]H. Hawkins, Analysis of School District Litigation as a Precursor for the Development, Adoption, and Implementation of Preventive Law Measures, unpublished research funded by Texas A&M University, 1983.

[35]P. Zirkel, Outcomes Analysis of Court Decisions Concerning Faculty Employment, *NOLPE School Law Journal*, 10(2) 1982 at 179.

[36]T. Maxwell et al., Student Litigation: A Compilation and Analysis of Civil Cases Involving Students, 1977-81, *National Center for State Courts*, 1981.

CHAPTER 3

PREVENTIVE LAW - AN EMERGING CONCEPT

Conventional ways of dealing with conflict resolution rely on two systems. These approaches were presented and discussed as Figures 1 and 2 in the previous chapter. The first of these graphic presentations depicts an active mode for the settlement of disputes. This method uses school district policy and practice as the primary foci. The second figure is based on a reactive mode in which litigation is used as a mechanism for relief. A proactive stance relating to conflict would tend to reduce cost, time, and emotionalism. Where does one look for a new model or an emerging concept such as preventive law?

The author's interest in how school administrators view legal requirements was fostered by a conversation many years ago with a colleague who also taught school law. He said that his advice to beginning school administrators was: Do what you need to do administratively and then figure out afterwards how to legally justify your actions! Is that what school law teaches about administrative practice? Such an approach demonstrates at least one valid reason why administrators and school boards have become heavily involved in litigation as a method for settling legal problems. The purpose of this chapter is to examine preventive law as an emerging concept that is becoming better understood in education.

Origins of Preventive Law

In the medical field, prevention is a practice that continues to prove highly successful. Well recognized, for example, was the effective use of the Salk vaccine in the almost complete elimination of poliomyelitis, a great achievement of preventive medicine. Law, however, has yet to be noted for equally miraculous prevention.

Brown[1] is regarded as the first to write about preventive law and to espouse the benefits of prevention as a viable legal concept. An attorney in

California, Brown premised his work on the simple belief that "It usually costs less to avoid getting into trouble than to pay for getting out of trouble."[2] But this philosophic stance was directed largely toward business and industry; little, if any, application was made to education. The advocacy of preventive law in the business world was based on examples of need, the avoidance of excessive costs, and the remedies one could take to lessen the likelihood of resorting to dispute resolution by the courts. However, in 1980 an inquiry to the American Bar Association yielded no evidence that the concept of preventive law had permeated the preparation programs of attorneys.[3]

In education the first reference to prevention as a legal concept appears to be that found in the preface to a higher education law textbook by Kaplin.[4] His use of the term makes a distinction between *treatment* law and *preventive* law. Treatment law relates primarily to those instances in which the practices of the institution are challenged. Under this view of law, the educational system takes specific steps to protect its own interests. Preventive law, on the other hand, "involves a continual setting of the legal parameters within which administrators should operate in order to avoid litigation or disputes with governmental agencies."[5] Kaplin indicated that preventive law was not yet widely accepted on many campuses despite the increase in legal problems in higher education. Since Kaplin wrote from the perspective of private (independent) education, he saw prevention primarily as a means to safeguard the legal relationship between private institutions and governmental agencies. For the public school system, legal relationships arise more often between the system and individuals or groups of individuals. Such problems often involve the alleged deprivation of constitutional and statutory rights. Preventive law, then, may have increased implications for public institutions, but is not limited to the public sector.

Yudof, dean of the law school at the University of Texas, commented on dispute resolution:

> The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb—The worse the society, the more law there will be. In Hell there will be nothing but law and due process will be meticulously observed.[6]

Perhaps the best that public schools can hope for is a reasonable balance between these two extremes. Yudof, et al., view public schools as accepting the legalization of dispute resolution. Absolute adherence to rules can result in a lessening of official discretion in making decisions about teachers and students. In the opinion of these legal authorities balance is needed

"between rule and discretion, formality and informality, trusting and adversarial relationships."[7] A closing commentary discusses the role of law in educational settings and suggests that preventive law is viewed by the Education Commission of the States as a help to state education officials in meeting emergent legal requirements before the fact—a recognition that a proactive approach in education may be needed. (See references in Chapter II of this monograph for the active and reactive models of conflict resolution.)

A significant beginning in gaining visibility and recognition of the preventive law concept occurred in 1983. The National Organization on Legal Problems in Education (NOLPE) held its annual meeting in Colorado Springs, Colorado, with preventive law as its conference theme. In its publication of the convention papers, NOLPE acknowledged the controversial nature of its theme. Bednar gave the keynote address of the preventive law program and stimulated considerable interest in the concept. His approach to preventive law first emphasized cost as a factor. Few could disagree with his admonition that it costs less to avoid trouble than to get out of trouble. His rationale for recommending preventive law strategies was stated this way:

> If we are not satisfied with the legal result that would flow from one set of facts, we may be free within surprisingly broad limits to draft our board policies, our school rules, our administrative directives, and our contracts, library books, religious holidays and the other myriad things entailed in running a school system, in such a way as to yield an entirely different set of facts when a point of legal dispute is eventually reached.[8]

An interesting aspect of the Bednar address was its focus on the practice of law by the school district legal counsel. This was appropriate since the audience included school attorneys as well as school administrators and education law professors. To have an attorney present preventive law as a relevant concept for the practicing attorney added considerable credibility and a needed dimension.

Bednar's presentation identified an additional source of material. Much of his conceptual base was derived from the Preventive Law Reporter,[9] a publication first appearing in 1982. This periodical focuses primarily on business and corporate law with little reference to education law. The reporter does include case law summaries from education whenever they are brought to the attention of the editors. A major value of these materials is the analysis of specific litigation in terms of the preventive measures taken or that could have been taken to lessen the amount of litigation.

Brown and Dauer, in one of the Reporter series, provided an attorney's perspective on the theory and practice of preventive law.

> Dispute-centered representation-advocacy focuses largely if not exclusively on the things that have already happened. Preventive-lawyering is concerned largely if not exclusively with things that might happen in the future. From the clients (sic) point of view advocacy is necessary to correct an undesired problem that has already occurred; planning is useful to structure the future in some desired and optimal way.[10]

The implications are that preventive law is not merely a concept for administrators to use in setting their houses in order but it can in many ways "[be] a distinctive part of the practice of law."[11]

A less optimistic view comes from an administrator of a major law school in a private institution of higher education. Derek Bok, president of Harvard University and himself a former law professor, described in his 1981-82 Report to the Board of Overseers a flawed legal system urgently in need of reform. he negated the potential of change coming from legal scholars "since [they] are rarely trained in the methods of empirical investigation and hence do not devote themselves to exploring the actual effects of legal rules on human behavior."[12] Citing the effects of intervention in education by the courts and other governmental agencies, Bok continued:

> Investigations to determine the impact of legislation or to assess new forms of dispute resolution will call for elaborate empirical and statistical studies. Attempts to ascertain the value of specific rules and procedures may require methods of cost-benefit analysis. Efforts to predict the burdens produced by new regulations may demand techniques of modeling and computer simulation. Projects of this kind are difficult for law faculties. . . As a result new forms of cooperation will be required with specialists from other disciplines and research traditions.[13]

Cooperative efforts are needed. Educational administrators should focus on new legal mechanisms and strategies. Technical assistance must be provided by those in the legal profession. Significant inroads could be made on the reduction of litigation used to legitimize poorly made decisions at operational levels.

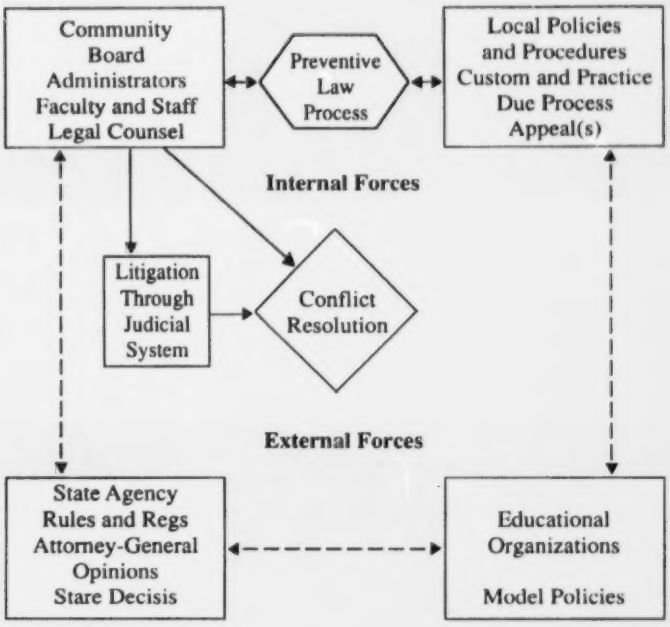
The New Model Emerges

The political/administrative and the litigation models for conflict resolution were discussed in chapter one. Those models of conflict resolution were depicted as the active and reactive modes. Both techniques have served education in a limited manner. The need is for a conflict reduction mode that is less costly and less adversarial in its approach.

Figure 3 presents the preventive law model for the lessening of litigation. This new model advocated here is based on a proactive mode as an approach

to the settlement of disputes. The elements of the first two previous figures are preserved here but the emphases are changed. Conflict resolution evolves mainly from forces within the community and school district, but external forces have not been fully displaced as having impact on the problem. Here the proactive mode is accepted by education officials in implementing the preventive law concept as a mechanism through which to filter their perspective, review, and decisions. Much of this filtering process relates to local school district policies and procedures. Routine custom and practice, as well as due process requirements, are reviewed in the absence of specific problems rather than at a time of crisis.

Figure 3
Preventive Law Model
Proactive Model for Conflict Resolution



This figure suggests that some litigation may still be needed, but the size of the box representing litigation is smaller than shown in the reactive mode. Likewise, the box for conflict resolution is reduced to depict fewer disputes to be resolved due to policies and practices that are more legally sound and

accepted. Since the actual volume of conflict in any school district is a relative factor, the figure depicts a change consistent with the theoretical aspects of the concept.

Understanding the preventive law concept and a willingness to explore its implementation necessitate a belief that a remedy applied prior to an identified conflict is preferable to what Kaplin called treatment law. Having adopted the preventive law process, a school district, through its board and administrators, will assume a different legal posture than before. Policy and procedure review will be conducted on a periodical basis to assure the avoidance of misunderstandings, multiple interpretations, and the lack of specificity. Analyses of case law may help to identify legal inconsistencies in school district policies and in operational procedures. Outside technical assistance may be sought in devising techniques such as mediation by which disputes can be resolved before unyielding positions arise. More comprehensive means to identify gaps and vagueness in school district practices will be developed. The legal audit, a method still in the early stages of conceptualization, will be explored whenever there is a readiness to embrace the concept of preventive law. The willingness of a school district to incorporate preventive law into the administrative process would demonstrate its potential for increasing acceptable conflict resolution and lessen its reliance on litigation.[14]

Applying Preventive Law in Schools

Two litigated cases are presented below, one in which efforts at prevention are not discernible and one which illustrates that prevention can protect the system even though litigation is not avoided.

In a teacher contract non-renewal case[15] these facts are significant. Janet Cooper was employed in the Kingsville [Texas] Independent School District. Since 1967 she had served with annual contracts without tenure. During the school year 1971-72 Cooper used an exercise in her history class related to conditions following the Civil War. The teaching method included role playing from which considerable classroom and community controversy resulted. The District made a decision in the spring of 1972 not to renew her contract. The reason for a school district initiated suit was to seek a declaratory judgment that Cooper's rights had not been violated by the contract non-renewal. A counterclaim for equitable relief was filed by Cooper. She alleged violation of her First and Fourteenth Amendment rights and asked for reinstatement with backpay. Her action was based on 42 U.S.C. Section 1983 and on the Constitution. The sequence of events in this dispute covered many years. The various legal actions that ensued were:[16]

1. As a result of parental complaints the teacher was advised by the principal "not to discuss Blacks in American history" and "nothing controversial should be discussed in the classroom."

2. Later that year both the principal and the superintendent recommended Cooper for contract renewal. The Board did not accept the recommendation.

3. The Board brought suit in federal district court for a declaratory judgment that Cooper's constitutional rights had not been violated.

4. Cooper counterclaimed asking for equitable relief alleging violation of her rights.

5. The District Court found for the teacher basing its decision on statements from the Board that Cooper would have likely been reemployed if she had not used the teaching methods which caused the complaints.

6. The school board appealed and the teacher filed a cross appeal.

7. The Court of Appeals vacated and remanded. (Se the decision aside and ordered the case returned to the District court.)

8. On remand, the District Court again found for the teacher and awarded damages and attorney fees.

9. The school district again appealed and the teacher cross-appealed.

10. The Court of Appeals in an eight point decision found for the teacher.

This litigation covered a span of seven years. The school district reported that an estimated $143,026 was the dollar cost of this employment decision exclusive of the hours expended by school district officials. Preventive law measures that might have strengthened the school district's case would include, for example: (1) a policy defining academic freedom for classroom teachers; (2) a clear direction to the teacher regarding acceptable teaching methods; (3) a statement outlining the school board's procedures when rejecting an administrator's recommendation to continue a teacher's employment; and (4) grievance procedures for handling complaints from parents. Since the courts will tend to construe strictly school district policies and procedures, a school district should operate with policies that will stand close scrutiny.

In the second illustrative case,[17] a secondary school administrator brought a civil rights action against a small east Texas school district. He alleged that

his First Amendment rights were violated because his contract was not renewed. Yielding, the junior high school principal, had held his position for more than ten years under two different superintendents. Both of these administrators had experienced difficulty with the principal's performance. The district court rejected his claims, and the Fifth Circuit Court found that the principal's discharge was not improper. What was the evidence that led to this finding? The facts presented to the Court conveyed a basic understanding by the school district regarding sound practice—consistent with the preventive law concept. In February 1972 a memorandum had been provided to Yielding outlining various concerns of the school board about deficiencies in his performance. Corrections that were spelled out to him included: (1) the need to improve his communication skills so that parents, students, teachers, and others were not embarrassed, intimidated, or made to feel inferior; (2) the need to improve his listening capabilities with parents, particularly from the black community; and (3) the elimination of his tendency to be overly familiar with female students. His contract for the next year was labeled as "probationary." In February of the following year his new superintendent issued another letter noting the same deficiencies and several specific additional needed improvements. His non-probationary contract for 1975-76 indicated that lack of improvement could result in release. In 1978, the Board accepted the superintendent's recommendation for non-renewal of Yielding's contract. Perhaps the efforts for improvement were too prolonged. But efforts to achieve professional improvement were tried and proven unsuccessful. The administration and the board used carefully documented measures that, if not planned as preventive law strategies, were nonetheless consistent with efforts to seek improvement and finally to bring about an orderly dismissal. The emphasis here is on appropriate procedures. One might contend that a "paper trail" was used to cover the actions of the school administrators. A court might not always be able to judge personal motivations of officials. By and large a court can analyze procedures in terms of legal requirements. Dispute resolution through a reasonable administrative (political) process coupled with preventive techniques in this case minimized the litigation.

Summary

This chapter discussed the concept of preventive law and provided examples of both misuse and limited use of litigation. The chapter that follows presents preventive law strategies as ways to lessen the involvement of school systems with the courts.

Chapter Notes

[1]Louis M. Brown, *Preventive Law* (1950).

[2]Id at 3.

[3]Letter from John E. Carlson, Assistant to the President, American Bar Association to Harold L. Hawkins (May 28, 1980).

[4]William A. Kaplin, *The Law of Higher Education*, (1978).

[5]Id at xii.

[6]Mark G. Yudof, David L. Kirp, Tyll van Geel, and Betsy Levin, Educational Policy and the Law at 227, 228 (1982) (quoted from G. Gilmore, *The Ages of American Law* at III (1977).

[7]Id at 227.

[8]William C. Bednar, Jr., Preventive School Law, *School Law Update—Preventive School Law* at 6 (1984).

[9]See *The Preventive Law Reporter*, David A. Winn, Editor and Publisher. Louis Brown, referenced in Note 1, along with Edward A. Dauer serve as consulting editors. Available from PL Publishers, a division of C.E. Publications, Inc. P.O. Box 97020, Kirkland, Washington 98083. Mr. Brown has expressed surprise at the growing interest in preventive law by educators and school administrators.

[10]Louis M. Brown and Edward A. Dauer, A Synopsis of the Theory and Practice of Preventive Law (Part I), *Preventive Law Reporter*, at 7, (July, 1982).

[11]Id at 7.

[12]Derek C. Bok, A Flawed System, *Harvard Magazine*, (May-June 1983) at 43.

[13]Id at 71.

[14]Kaplin, Supra. See note 4.

[15]*Kingsville Independent School District v. Cooper*, 611 F2d 1109 (1980).

[16]Hawkins, See note 34 in Chapter 2. The facts given here were from unpublished research at Texas A&M University in 1983.

[17]*Yielding v. Crockett Independent School District*, 707 F2d 196 (1983).

CHAPTER 4

PREVENTIVE LAW STRATEGIES

In order to reduce or avoid litigation, educational administrators must apply the theory and concepts of preventive law. The preceding chapters contain background material on litigation and principles of preventive law; in this chapter are descriptions of strategies for the application of preventive law to specific acts of commission or omission.

These acts result from:

- a tendency to discourage open communication about legal requirements
- an inability to understand the effect of the law on school district operation
- an inconsistency in the application of the law
- the difficulty in staying current with legal changes
- the lack of voluntary external systems for proactive legal change

Strategies for preventing charges of malfeasance and nonfeasance are ways by which administrators and governing boards can reduce the need for resolution of disputes in courts. The strategies are independent in nature; they are hierarchical in that the range is from activities and practices in limited use to those requiring a commitment to the concept of preventive law. Although preventive law is applicable to a wide range of educational contexts, many of the strategic materials are designed for use in specific contexts, e.g., school discipline, personnel, and curriculum. The preventive law strategies discussed here represent five related areas. Each of the strategies is followed by a brief inventory of potential causes of conflict in schools. Brief elaboration is then provided for implementation of the strategy.

Strategy 1: Increase communication on a regular basis among teachers, administrators, and parents.

Potential causes of conflict related to Strategy 1:

- new statutory requirements
- revised school district policies
- academic freedom
- change of attendance areas
- grading procedures
- teacher performance evaluations
- participation in extra-curricular activities
- channels of appeal
- attendance requirements
- parental responsibilities

Increased communication by its very nature tends to open the educational setting to better working relationships. Some would contend that a greater flow of information adds to legal problems. Certainly instances can be cited to demonstrate this belief. Increased participation in policy development by teachers produces a greater number of minor conflicts; however, the number of severe disputes, perhaps leading to litigation, decreases with faculty involvement in governance decisions. Attempts by an administrator to be secretive or to withhold essential information leads to suspicion and mistrust. Several ways to implement a strategy are suggested to improve communication in a preventive law context.

Publication of handbooks is a typical way of disseminating information to employees. Usually this type of publication provides essential information to internal audiences about policies and regulations. An example of how the concept of preventive law can be broached is found in the Preventive Law Handbook prepared by the Office of the Judge Advocate, Randolph Air Force Base, Texas. The Foreword has this concise statement:

> The purpose of this preventive law handbook is problem avoidance. While no publication, let alone a brief handbook like this, can resolve all of an individual's potential legal difficulties, it may provide the proverbial ounce of prevention. . . Preventive law, like preventive medicine or preventive maintenance, is intended to anticipate problems early. The cost in time and money to avoid a legal problem is nearly always less than the cost of solving it. . .[1]

Hector M. Cuellar, the Base Commander, set the stage by declaring himself a firm believer in preventive law. The handbook includes information needed by military personnel about various issues, e.g., claims,

automobiles, wills, insurance, renting a home, Texas marriage requirements, etc. Most teacher handbooks contain information about equally important issues related to school district operation. Such information might well be couched in terms of preventive law.

A monograph by Frels and Cooper[2] contains ways to increase communication within school districts about teacher evaluation. The evaluation system presented by Frels and Cooper advocates improving teacher performance as a first priority. A second alternative, the final option, is termination. Despite the lack of reference to preventive law, the procedures outlined are clearly consistent with efforts to reduce litigation when termination becomes necessary. Major emphasis is placed on a documentation system. Attention is then given to evaluating termination options. Especially valuable are the sample memoranda provided for administrative use. Frels and Cooper offer their system with an acknowledgement that it is not fail-safe. Written primarily for the administrator's use, the publication can serve effectively for all in education who have to supervise and evaluate personnel.

Strategy 2: Improve understanding of educational law.

Potential causes of conflict related to Strategy 2.

- interpretation of in *loco parentis*
- nature of employment contracts
- governmental immunity to tort liability
- division of responsibility between local district and the state
- limitations on use of corporal punishment
- duty of care required
- parental rights in child's education

An improved understanding of educational law can be expected to reduce the negative effects of conflict. The American Association of School Administrators (AASA), through its National Academy for School Executives (NASE), has recently initiated seminars in preventive law.[3] Academy Director Jerry Melton stressed the value of the seminars as vehicles for improving the understanding of law:

> The national Academy has been offering inservice training programs to school administrators since 1968. Seminars dealing with legal problems of school officials have been among our most widely attended since the early 70's. In April, 1984, the seminar on *Preventive* law concepts and practices was offered for the first time to some 40 administrators from all over the country. Given the

> success of the April seminar, we have proposed to present the program in March, 1985, in Dallas and in June, 1985, in Colorado Springs. The materials prepared by Hawkins, Shulman, and Zirkel became an integral part of that first seminar and were packaged in an AASA-NASE three-ring binder for each seminar participant. Our previous experience indicates that these materials will be used and referred to many times by participants.[4]

Another method of improving understanding of education law is the conference. Most law conferences provide helpful information; usually, however, such conferences lack any direct reference to preventive law. The National Organization on Legal Problems of Education (NOLPE) in 1983 deviated from its previous custom of a non-issues oriented conference and conducted its national conference using a preventive law theme. The preventive law theme assured considerable emphasis on the emerging concept although many papers were presented related to more conventional topics. Direct application was strongest in these topics:

Preventive School Law	William C. Bednar, Jr.
Legal Responsibility of Educators in Child Abuse	Eric S. Mondschein
How to Avoid an Educational Malpractice Suit	Arlene H. Patterson
Empirical Research on Education Law Issues: A Model	M. Chester Nolte
Role of Public Relations in Preventive Law	Paul D. Kemp

The extent to which informed discussion takes place is more important than the selection of topics for scheduled meetings. Preventive law was discussed more predominantly at this conference than topics at prior conferences. This legal concept highlighted in 1983 still generated considerable discussion at the 1984 conference. Communication between and among professional groups can be made relevant and valuable when presented in a challenged and pertinent context. Conferences based on preventive law create a responsiveness that produces increased interest and desire for implementation strategies.

Another source of information on preventive law is available on a regular basis in the *Preventive Law Reporter.* Although this publication is oriented

to corporate and business law, some education law material is included. For example, a case summary (*McGee v. South Pemiscot School District*, R-V, 712 F2d 339 8th Circuit, 1983) reported in 1983 contains information about school board member liability. In this case a teacher's contract was not renewed despite a satisfactory performance evaluation. The teacher contended that his First Amendment rights had been violated as a result of his public advocacy of the continuation of a junior high school track program. Other judicial decisions at about the same time confirmed the legal point of the need to determine if the termination of employment would have occurred regardless of the freedom of speech issue. The case summary provided in the Preventive Law Reporter is significant in its reference to preventive measures that should be observed in any similar circumstance involving contract non-renewal.[5]

Strategy 3: Strengthen consistency in the implementation of policies and procedures.

Potential causes of conflict related to Strategy 3:

- adaptation of policy to resolve specific occurrences
- building level procedures inconsistent with district-wide policy
- poorly written policies and procedures
- insufficient record system
- insufficient distribution of printed policies and procedures
- lack of annual review
- unclear lines of authority

An analysis of litigation in education, particularly that involving personnel, suggests that many problems originate in inconsistent implementation of policies and procedures. The courts devote considerable attention to equal treatment of employees. Hence, school boards and administrators will find this strategy especially important.

The following list of recommendations from Swerdlow will improve consistency in personnel relations:

1. A probationary period should be established for all employees.
2. Written policies covering discipline and discharge should be established.
3. Discipline and discharge should be handled with fairness and due process.

4. A review of the employee's personnel file should be undertaken before imposing discipline or discharge.
5. Any special characteristics of the employee should be considered before imposing discipline or discharge.
6. Performance and reviews should be honest.
7. Most cases call for counseling and/or progressive discipline.
8. Never utilize the "freeze-out" approach.
9. Tell the employee why the disciplinary action is being taken.
10. Long-term employees should be given extra special care.
11. Do not terminate employees while they are disabled.
12. Discipline should take place promptly after an incident.
13. Before implementing discipline or discharge try to evaluate the facts from the standpoint of a jury of lay persons.
14. Be especially careful when a discharge involves a charge of moral turpitude or dishonesty.
15. A separation of employment agreement is highly desirable and is a way to avoid liability.
16. In difficult cases, consult with an attorney before the discharge or discipline.
17. In a limited number of cases, an employment agreement can be used to limit liability.
18. Personnel policies and employee handbooks should be written in a style that most effectively allows the company [or school district] to run its business.
19. Being able to prove that you are right is as important as being right.[6]

Student discipline is always an area of potential conflict. Written policies, rules, and regulations are the accepted methods to promote understanding by students and consistency of application by educators. Administrators, teachers, students, and parents benefit from carefully worded statements that govern student conduct. Recent legislation in Texas requires (effective September 1, 1986) each school district to have a discipline management plan approved by the state education agency.[7]

A hearing guide is an appropriate way to assist a board president in conducting school board hearings. The guide not only helps the board to function as an impartial tribunal but also adds consistency to the operations of boards in carrying out this task. Careful adherence to this or a similar guide is an excellent preventive law device. If litigation does eventually result from a personnel dispute, any court will find the use of the guide clear evidence of the school board's desire to handle appeal hearings on a sound, effective, legal basis.[8]

Strategy 4: Periodic internal review of school district policy.

Potential causes of conflict related to Strategy 4:

- unusual turnover among school board members and administrators
- lack of well organized coded system of policy and procedure
- lack of designated time for periodic review
- review process not defined nor mechanics devised

In the period 1950-1970, school boards and administrators devoted much time to policy development and revision. School districts across the nation discovered that written policies were essential even in the smallest school systems. More recently a second phase of policy utilization has been evolving. Careful analysis of policies in a preventive law context is becoming more accepted.

McClung has provided a procedure that is designed for internal review by administrators, school boards, and other local personnel. His four-step implementation procedure will help school districts identify those policies with potential pitfalls. His steps are:

(1) *Anticipation* of legal challenges.
(2) *Evaluation* of the legal merits of these challenges.
(3) *Consideration* of the policy issues raised by potential challenges.
(4) *Modification*, where appropriate, in response to the first three steps.[9]

These procedures are based on a preventive law frame of reference, and McClung viewed their use as one means of avoiding litigation. The process requires a continued motivation to maintain the most effective policies that are possible.

A somewhat different type of internal review is possible using a list of procedures devised by Mondschein and Greene which relate to Title IX and extracurricular activities. Administrators are encouraged to give careful attention to legal and educational issues that concern potential sex discrimination.

Areas of review are:
1. A definition of extracurricular activities to distinguish them from required and elective course offerings and other school activities;
2. Clear policies and practices along with notice to all students that they have the lawful right to participate in all extracurricular activities;
3. Awareness and training of all school personnel of legal liabilities for denial of civil rights;

4. A self-evaluation of the benefits derived from the extracurricular activities and participation on the basis of gender;
5. A survey of student interest in present and future extracurricular activities;
6. Policies and practices for assigning faculty and others to insure positive role models to encourage full student involvement;
7. A procedure for reviewing facilities, time and transportation needs to alleviate possible deterrents to student interest and participation;
8. Methods of recruitment of students whose past access to extracurricular activities has been limited or denied;
9. A self-evaluation of the distribution of faculty participation in paid or non-paid responsibilities;
10. An analysis of areas of responsibility, numbers of students served, supervision of other faculty and commitment of time in considering compensation for extracurricular activities.[10]

A helpful guide was published in Texas in 1982 for use in the development of school district policies which govern student discipline. Attorney-General Mark White conducted a state-wide conference on school discipline. Participants included educators, health and human services personnel, and law enforcement officers. From this activity came a publication titled *Governor's Code of Student Conduct and Parental Responsibility.*[11] Some of the topics in the model code are: offenses to property; offenses to the person; weapons; assaults; general conduct; student activities; student publications; possession or use of tobacco; alcohol and drugs; student discipline; detention; corporal punishment; and alternative placement.

The model code cites appropriate statutes and/or case law for the various topics. Sample policy statements for each of the disciplinary areas are provided. The code stresses the need for locally determined policy, adapted from the code, and the need for review by local school district legal counsel. The preventive law aspects of this material serve as an encouragement for internal policy review on a proactive rather than a reactive basis.

Strategy 5: Development of systems for external preventive legal audit.

Potential causes for conflict related to Strategy 5:

- biased view of school officials regarding their own practices
- unwillingness to admit error
- difficulty in identifying changes over time
- legal audit without precedence
- legal experts oriented toward treatment rather than prevention

Of the various strategies for implementing preventive law, the most difficult and the least ready for wide-scale use is the legal audit. In 1982 Hawkins advocated the development of a legal audit. His rationale was:

> This is an era of audits; there are fiscal audits, facility audits for energy conservation, and educational performance audits aimed at accountability. Needed perhaps is a *preventive* legal audit, not for addressing the wrongs already committed but rather to identify violations of the law that might lead to litigation.
>
> Efforts to review the potential of a legal audit have led to a potential plan that would constitute an on-site analysis of various school district documents and procedures by a trained audit team. The following would be examined for possible legal conflict; policy and procedure manuals, recruitment procedures for all employees; professional and non-professional employment contracts; approval process for contract approval and resignation; job description (to determine extent of discretionary authority); procedures for non-employment contracts; minutes of governing board(s) and committees; student recruitment and/or admission.[12]

There is a similarity between systems developed for internal review and external audit. Such an audit would be more comprehensive and objective since the audit team would be comprised of persons trained in the audit process and selected from outside the school system. Unlike a fiscal audit, the services performed in the legal area would presumably be of an advisory nature. Hence, the results of a voluntary review would not need to be certified in the manner of a mandatory fiscal audit.

Zirkel[13] is one of several persons developing an audit for use in public school curriculum. His approach deals with a broad array of curriculum areas. For example, one of his designed procedures can be applied to Religious Instruction. For all sections of the audit, Zirkel uses a common format with these column headings:

1. Check cost of practices.
2. Trigger response yes or no.
3. Source: Constitution, Legislation, Regulation
4. Probability: Low-High
5. Cost: Low-High

Each audit area, such as the above, is accompanied by supporting case law citations.

Another audit procedure has been given developmental trial on the West Coast. Terry and Reaves reported on a system used by the School Directors Association in the state of Washington and the Employer/Employee Rela-

tions Division of the Association of California School Administrators.[14] The audit environment is presented as a pyramid. The peak includes: required policies; policies for effective schools; and policies for sensitive issues. The mid area comprises the evaluation and assembly of materials documenting the valid administrative process. The base of the pyramid is an evaluation of board policies for legal sufficiency. This environment is subjected to an audit probe that proceeds from limited disclosure to maximum disclosure. The list of topics (policy areas) numbers nearly 80. For each, a legal reference, a corresponding Washington State policy, and a blank column in which to insert the corresponding district policy are given.

One of the first attempts at legal auditing was in an independent university. The Center for Constitutional Studies, University of Notre Dame, in 1981 published a legal inventory.[15] The inventory covers six areas:

1. Governance and Trustees
2. Academic Administrators
3. Admissions, Financial Aid and Student Programs
4. Business Affairs
5. Development
6. Special Problems of Church-Related Colleges

Although the nature of the institutions for which the inventory was designed differ from those upon which this monograph focuses, the format should prove useful. Like other audit materials, the Notre Dame inventory is of value to either internal review or external audit.

Regardless of whether an audit is performed by an external team or a group of school officials from within the school district, the audit represents a mechanism for discovery-the discovery of points of legal vulnerability that otherwise would remain unknown. The identification of legally vague policies, the lack of full compliance to open meetings and open records, the inconsistency of the administration of professional leave, and the technical interpretation of an employment practice all can become areas of mistrust as well as the bases for legal action. An audit of a local school district's operational practices will not alter problems outside the district. Discrepancies in legal opinions, unclear statutes, and regulations that are not applicable to the specific local issue will continue to be troublesome. The audit is conceived as a helpful tool.

Summary

The strategies presented are a mixture of ideas from the past and new approaches. Preventive law is neither a panacea for the ills of education nor

a way to avoid litigation totally. Essential to the concept of preventive law is a firm belief that many disputes in education can be avoided and that a proactive stance regarding legal problems is justifiable and wise. The preventive law concept and strategies for implementation should prove useful to practitioners, teachers, and students of education law. Based on a conviction that much litigation should and can be avoided, preventive law offers a promising approach to reducing litigation.

Chapter Notes

[1]D. Kansala, *Preventive Law Handbook* (Foreword). The Office of the Staff Judge Advocate, 12th Flying Training Wing, Randolph Air Force Base, Texas, 1983.

[2]K. Frels and T. Cooper, *A Documentation System for Teacher Improvement or Termination, NOLPE* (1984).

[3]Selected samples of the NASE seminar materials are displayed in the appendix. The Louis Brown Fund of Los Angeles, California in April, 1985 gave national recognition to these preventive law materials through a monetary award for materials developed as a project.

[4]Comments taken from a letter dated January 21, 1985, written by Jerry Melton, Director, National Academy to The Louis Brown Foundation, Los Angeles, California.

[5]School District Liability for Illegal Actions of Board Members, *Preventive Law Reporter*, David A. Winn (Ed.), October 1983, Vol. 2, No. 2 at 46-47.

[6]Seymour Swerdlow, Wrongful Discharge: A California Labor Lawyer's Perspective and Preventive Recommendations, *Preventive Law Reporter*, October 1983, Vol. 2, No. 2 at 28.

[7]John Aldridge, *Discipline-Management Program and Code of Student Conduct*, Texas Association of School Boards, 1985. These materials are subject to further revision to meet mandates resulting from recent legislation.

[8]Gerald Anderson, *Hearing Guide*, unpublished material used by the Brenham (TX) Independent School District, undated.

[9]Merle Steven McClung, Preventive Law and Public Education: A Proposal, *Journal of Law & Education*, January 1981, at 39.

[10]Eric Mondschein and Loel Greene, Title IX and Extracurricular Activities, *School Law for a New Decade*, NOLPE, 1981 at 152.

[11]State of Texas, *Governor's Code of Student Conduct and Parental Responsibility*, undated.

[12]Harold L. Hawkins, Back to the Legal Basics: An Ounce of Prevention, *Kansas School Board Journal*, Winter, 1982 at 8.

[13]P. Zirkel, An Instrument For a Legal Review of Public School Curriculum Policies and Procedures, *Preventive Law Reporter*, Volume 4, August 1985 at 15. Perry Zirkel is a member of the NASE seminar team in Preventive Law. His materials are currently under further development and subject to copyright.

[14]John David Terry, II and Asa E. Reaves, Prevention through Policy Development and Legal Auditing, unpublished, 1985.

[15]Center for Constitutional Studies, University of Notre Dame, *A Legal Inventory for Independent Colleges and Universities*, 1981.

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